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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15
16 THOMAS PEREZ, Secretary of the
United States Department of Labor,
17 Plaintiff,
18 v.
19 GREATBANC TRUST COMPANY, et
al.,
20 Defendants.

21 Case No. ED-CV12-1648-R (DTBx)
**RESPONSE BY GREATBANC
TRUST COMPANY TO
SECRETARY OF LABOR'S
OBJECTION TO GREATBANC
TRUST COMPANY'S GRAPHIC
AND ILLUSTRATIVE MATERIAL
AND MOTION IN LIMINE AND
MOTION TO STRIKE [Doc. #107];
DECLARATION OF JOSEPH C.
FAUCHER**

1 The Secretary of Labor seeks exclusion of certain graphic and illustrative
 2 material that Defendant GreatBanc Trust Company (“GreatBanc”) disclosed as
 3 required by Local Rule 16-3 on November 22, 2013, 11 days before the original
 4 trial date. The bases of the Secretary’s objection are that: (1) the proposed graphic
 5 and illustrative material includes exhibits included within the Confidential
 6 Supplemental Disclosure, which the Secretary seeks to exclude as an untimely
 7 “rebuttal” report; (2) the graphic exhibits include “substantially new expert
 8 analysis” and (3) none of the material in the slides that the Secretary seeks to
 9 exclude comes “entirely” from the first expert report issued by GreatBanc’s expert
 10 witness, Richard May, on September 4, 2013. (See, Objection, Doc. 107, pp. 1-2.)
 11 None of these arguments warrant exclusion of any of the graphic and illustrative
 12 material disclosed by GreatBanc.

13 First, there is no requirement that expert witnesses be the source of graphic
 14 and illustrative exhibits. The Secretary’s argument, therefore, that some of the
 15 proposed graphic and illustrative exhibits are not “entirely” from Mr. May’s
 16 original expert report, is completely irrelevant to the Court’s inquiry. The
 17 Secretary’s own arguments work against him in this regard. He states at page 2 of
 18 the Objection:

19 For example, slide 13 purports to show a comparison of Sierra Aluminum
 20 Company’s pre and post-transaction equity and debt levels. This slide
 21 combines numbers from both Sierra’s financial statements and FMV
 22 Opinions, Inc.’s 2006 appraisal report. As this analysis does not appear in
 23 Mr. May’s first expert report, it is new analysis that goes beyond the bounds
 24 of permissible testimony for GreatBanc’s expert.

25 What Plaintiff does not address is why this slide 13 is inadmissible, given
 26 the fact that the source of the information set forth in the slide is other evidence in
 27 the case beside GreatBanc’s expert – namely, “Sierra’s financial statements and
 28 FMV Opinions, Inc.’s 2006 appraisal report.”

1 The material in all of the other slides that the Secretary seeks to exclude is
 2 also derived from material that is or will be in the record regardless of any expert
 3 testimony. As a reminder, the Secretary seeks to exclude slides 6-11, 13 and 14.
 4 The sources of the information in those slides are as follows:

5 • Slide 6 is derived from information from the June 20, 2006 report of
 6 FMV Opinions, Inc., an exhibit that the Secretary has offered in this case. The
 7 information in that slide is not dependent upon testimony of Mr. May.

8 • The information in Slide 7 comes from the expert witness report of
 9 the Secretary's expert, Dana Messina.

10 • Slide 8 is a quote from the Shannon Pratt treatise on valuation
 11 regarding the reliability of using book value as a valuation method. It is an exhibit
 12 to the case, and was cited most recently in the Motion by GreatBanc to exclude
 13 Mr. Messina's expert witness. It does not depend on expert testimony, and will
 14 take no one by surprise.

15 • Slide 9 compares median "WACC" rates¹ for guideline public
 16 companies used in the FMV Opinions, Inc. report, in the expert witness report of
 17 the guideline public companies mentioned in the Secretary's expert witness report,
 18 and Sierra. The information could easily be obtained simply from cross-examining
 19 Mr. Messina at trial.

20 • Slide 10 compares median implied long-term growth rates for
 21 guideline public companies used in the FMV Opinions, Inc. report, in the expert
 22 witness report of the guideline public companies mentioned in the Secretary's
 23 expert witness report, and Sierra. It does not depend upon any original testimony
 24 of Mr. May.

25 • Slide 11 compares the last 12 months returns on book equity of Sierra
 26 versus guideline public companies mentioned in the FMV Opinions, Inc. report,

27 28 ¹ "WACC" stands for weighted average cost of capital.

1 and the report of the Secretary's expert Mr. Messina. The source of that
 2 information is data from the FMV Opinions, Inc. report.

3 • Slide 12 is a synopsis of Mr. May's 3 primary opinions, as set forth in
 4 his September 4, 2013 expert witness report. The content of that slide comes
 5 entirely from Mr. May's *original* September 4, 2013 expert witness report. The
 6 Secretary does not contend that report was untimely.

7 • Slide 14 compares the interest rates on the senior debt issued to Sierra
 8 with the actual rate on the subordinated "exchange" notes at issue in the subject
 9 transaction and the estimated market rates for subordinated exchange notes. The
 10 source of the material on that slide is from the FMV Opinions, Inc. report, and the
 11 original September 4, 2013 report by Mr. May.

12 Thus, *none* of the slides that the Secretary seeks to exclude are premised on
 13 expert testimony at all. The slides will be admissible whether or not Mr. May
 14 testifies about them.

15 Second, the Secretary piggybacks on a motion he filed on November 4, 2013
 16 (Doc. 63), which sought to exclude GreatBanc's Confidential Supplemental
 17 Disclosure, which contained certain opinions of GreatBanc's expert witness,
 18 Richard May.² The basis of that Motion was that the Supplemental Disclosure,
 19 according to the Secretary, constituted an untimely rebuttal expert witness report.
 20 Although counsel for GreatBanc conferred with the Secretary's counsel on
 21 October 30 and offered to make Mr. May available for further deposition in
 22 Washington D.C. (where the Secretary's counsel is located) during the week of
 23 November 4, counsel for the Secretary refused that offer. (See Declaration of
 24 Joseph C. Faucher filed November 12, 2013, Doc. 122.) The Secretary's excuses
 25 for declining this offer were "... that the Court has ordered that discovery in this

26
 27 ² As of the filing of this Response, the Court has not ruled on this Motion, and no
 hearing has taken place on the motion which has been continued several times
 28 based on stipulations of the parties.

1 case is closed pursuant to Dkt. 44, the Secretary's trial preparation should not be
 2 disrupted because GreatBanc forgot about the deadline to submit an expert rebuttal
 3 report, it would be unduly burdensome to prepare and take a second deposition of
 4 Mr. May one month before trial, and Mr. May's second deposition may create
 5 additional discovery issues that we would be foreclosed from pursuing." (See,
 6 Declaration of Joseph C. Faucher filed concurrently herewith, Exh. 1 – October 31,
 7 2013 e-mail from David M. Ellis to Theodore M. Becker and Joseph C. Faucher.)

8 Thereafter, the trial was continued as a result of the Secretary's failure to file
 9 a proper pre-trial conference order, and continued again twice on the Court's own
 10 motion.

11 On December 8, 2013, counsel for GreatBanc reconfirmed that GreatBanc's
 12 offer to make Mr. May available for further deposition relative to the issues raised
 13 in the Supplemental Disclosure remained open. Nine days later, on December 17,
 14 2013, counsel for the Secretary again declined this offer. (See, Declaration of
 15 Joseph C. Faucher filed concurrently herewith, Exhibit 1.) Now, although more
 16 than *six months* have passed since that exchange between counsel for the parties,
 17 the Secretary clings to the fiction that he has somehow been "prejudiced" as a
 18 result of the Confidential Supplemental Disclosure, notwithstanding the fact that
 19 he could have taken Mr. May's further deposition and avoided any claimed
 20 prejudice whatsoever as early as November or December, 2013. Indeed, the
 21 Secretary seeks the further deposition of Mr. May as alternative relief in its
 22 Motion! GreatBanc's offer to present Mr. May for further deposition would
 23 eliminated any possible prejudice to the Secretary, but the Secretary repeatedly
 24 declined that offer.

25 Thus, to the extent the graphic and illustrative material is in any way
 26 derivative of the Confidential Supplemental Disclosure, and the Secretary's
 27 Objection to that graphic and illustrative material is based on his objections to the
 28 Confidential Supplemental Disclosure, the objection should be overruled and the

1 proposed graphic and illustrative material should be allowed. The Secretary has
2 not established and cannot establish how he has been “prejudiced” in any way. It
3 was entirely within his counsel’s power to avoid any such purported prejudice, but
4 counsel made the calculated decision to roll the dice, avoid taking Mr. May’s
5 further deposition, and hope that the Confidential Supplemental Disclosure would
6 be excluded.

7 Accordingly, GreatBanc respectfully submits that the Secretary of Labor’s
8 Objection to the graphic and illustrative material offered by GreatBanc should be
9 overruled and the motion in limine and motion to strike (which were never noticed
10 for hearing by the Secretary) should be denied.

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DATED: May 14, 2014

DRINKER BIDDLE & REATH LLP

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By: /s/ Joseph C. Faucher

JOSEPH C. FAUCHER

Attorneys for Defendant GreatBanc
Trust Company

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